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No. 97-679

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

AT&T seeks review and summary reversal of the Ninth Circuit decision that common carriers can be held liable under state law for breaching alleged oral or implied promises to provide faster or better service than is required by their tariffs. A majority of a divided panel of the Ninth Circuit concluded that these state law claims are not foreclosed by the statutory filed tariff requirements because it held that those requirements (1) apply only to rates and (2) in any event, allow enforcement of "side" agreements that address provisioning and other matters that are claimed not to be covered by the tariff. Pet. 10a-11a.

That this holding should be reviewed—and summarily reversed—has been vividly confirmed by the *amicus curiae* brief that has been filed on behalf of the local telephone industry by Southwestern Bell Telephone Company, Pacific Bell, and the United States Telephone Association ("USTA"), which is the trade association of the more than 1,000 incumbent local telephone companies (and of which AT&T is not a member).[1] It demonstrates that the Ninth Circuit's holdings on their face violate literally a century of this Court's decisions and that, unless reversed, the Ninth Circuit's decision will wreak havoc on the regulatory regime that has governed—and will continue to govern—the telecommunications industry and many other regulated industries as well.

More tellingly, even the opposition of respondent Central Office Telephone ("COT") does not defend the Ninth Circuit's holdings, but renounces them. In particular, contrary to its arguments successfully urged before the Ninth Circuit,[2] COT now concedes (1) that the filed tariff doc-

[1] *See* Brief *Amici Curiae* of the United States Telephone Association, Southwestern Bell Telephone Company, and Pacific Bell in Support of the Petition for a Writ of Certiorari, No. 97-679. The mere submission of that brief puts to rest COT's assertion that the filed tariff doctrine is an issue of limited prospective importance.

[2] *See* Brief of COT, at 35-36 ("Because this case does not involve rates or rate-setting issues, the filed rate doctrine is inapplicable"); *id.* at 37 (side deals may "fill in gaps" in tariff as long as they are not inconsistent with the tariff).

trine is " 'not limited to rates *per se*' " (Opp. 10, *quoting Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986)), and (2) that COT may not "enforce 'side deals' for services not covered by AT&T's tariff." Opp. 10. In this regard, COT acknowledges the century of decisions of this Court that hold that the statutory filed tariff requirements preempt state law claims of "a customer who paid one tariff rate while claiming services that were not required by the tariff." Opp. 13, *citing Chicago & Alton R. Co. v. Kirby*, 225 U.S. (1912); *Atchison, T. & S.F. Ry. Co. v. Robinson*, 233 U.S. 173 (1914); *Davis v. Cornwell*, 264 U.S. 560 (1924). *Accord Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126, 130 (1990).

Accordingly, rather than defend the Ninth Circuit's actual holdings, COT seeks to defend the judgment by advancing a host of other theories that all rest on a single premise: COT's claim that AT&T was found not to have breached untariffed side agreements, but to have engaged in "willful misconduct" and discrimination, by failing to provide COT with the same tariffed services that large corporate customers receive. Opp. 8-14. As explained in detail below, these claims are meritless.

However, the short answer to COT is that these other theories were not the basis for the Ninth Circuit's decision. Because the Ninth Circuit's actual holdings are patently erroneous, are undefended by COT, and would subvert important national interests, the appropriate course is for this Court to grant certiorari, reverse the Ninth Circuit's decision summarily, and allow COT to pursue any of its other theories that are not otherwise foreclosed on remand. *See Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

1. In light of the clarity of the Ninth Circuit's opinion on these issues, there can be no dispute about the actual grounds for its decision. Since enactment of the Communications Act, AT&T has been required to file tariffs with the Federal Communications Commission for all its inter-

state services. However, as the Ninth Circuit expressly stated, "COT's state law claims were based on COT's allegation that the contracts entered into with AT&T did not constitute the ordering of long distance pursuant to the requirements of AT&T's tariff, but rather constituted voluntary contracts" that "included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives." Pet. 5a-6a. This included the understanding that AT&T would provision new orders in 45 to 90 days. Pet. 5a. COT thus argued that while the billings and provisioning problems in its SDN service did not violate AT&T's tariff, they gave rise to three state-law claims: (1) they were a breach of the aforementioned "contract," (2) they violated AT&T's implied duty of good faith because they "undermined the purpose of th[at] contract," and (3) they constituted tortious interference with COT's business relationships because "any violation" of AT&T's "contractual duties [also] constituted tortious interference." *Id.*

As the petition showed, those claims are foreclosed by a century of this Court's decisions applying the filed tariff doctrine. *Maislin Indus.*, 497 U.S. at 126, 130. Those decisions hold that a carrier's filed tariff exclusively "governs the legal relationship between [customer] and carrier" and that "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Id.*; *see also, e.g., Kirby*, 225 U.S. 155; *Davis*, 264 U.S. 560.

The Ninth Circuit nonetheless rejected AT&T's claim "that all rights between AT&T and COT are governed by the tariff." Pet. 12a. The majority of the divided panel held that "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply." Pet. 10a. Alternatively, the majority held that the filed tariff doctrine does not prohibit side deals to supplement a tariff as to matters not contained in the tariff. Pet. 11a.

These are the holdings for which the case is now being cited and will hereafter be cited in litigation between carriers in regulated industries and their customers. In particular, these are the holdings that will be controlling authority in cases throughout the states of California, Alaska, Arizona, Hawaii, Montana, Nevada, Oregon, and Washington. And as the Petition and USTA's *amicus* brief demonstrate, critical national interests will be severely impaired if these holdings are not reversed.

2. However, while conceding that these holdings are erroneous and will defeat important federal policies in other cases, COT incongruously seeks to avoid review by urging alternative legal theories in this case. Its principal argument is that its claims were not barred by the filed tariff doctrine because COT made allegations of "willful misconduct" by AT&T. Opp. 8-10. COT notes that AT&T's tariff includes a provision declining to limit AT&T's liability for willful misconduct, and argues in any event that "willful misconduct claims are not precluded by the [filed tariff] doctrine." Opp. 9. However, the Ninth Circuit did not rely upon or even address this alternative argument. To the contrary, the Ninth Circuit *rejected* AT&T's claim that the magistrate had erred "by failing to instruct the jury that the only issue was whether AT&T violated its tariff through willful misconduct." Pet. 11a.

COT nonetheless suggests that the court's decision to remand the case for a trial on punitive damages implies that its decision to uphold the judgment was based on such a finding of willful misconduct. That is simply false. The case was remanded not because the jury had made such a finding of "willful misconduct," but because the Ninth Circuit held that under Oregon law, punitive damages are available if actual damages have been awarded for the tort of tortious interference with an economic relationship. *See* App. 19a (citing Oregon cases). And, as the Ninth Circuit explained, COT's tortious interference claim was entirely derivative of the breach of contract

claim, which rested on AT&T's breach of the alleged side deals, not on any willful violation of its tariff.

Moreover, as Judge Brunetti's dissent explained (Pet. 29a-30a), a "willful misconduct" theory could not have provided an alternative basis for the judgment below even if the majority had relied on it. First, the "willful misconduct" provision of AT&T's tariff is irrelevant here. That provision describes liability limitations when AT&T is charged with violating its tariff; it does not create a separate cause of action for allegations of generalized "bad acts" that do not violate the tariff. *See, e.g., Multi Communication Media Inc.* v. *AT&T Corp.*, 1997 U.S. Dist. LEXIS 5166 (S.D.N.Y. April 18, 1997) ("the willful misconduct clause merely assumes the enforceability of existing claims or defenses without creating new ones"). Where AT&T violates its tariff obligations non-willfully, any recovery by a customer is calculated pursuant to a formula dictated by Section 2.3.1 of the tariff. Pet. 54a. But if AT&T willfully violates its tariff, that limitation on liability is removed.[3] Because no tariff violations were alleged or found, this clause has no bearing on this case.[4]

Moreover, the supposed "willful misconduct" claimed by COT is AT&T's failure to implement the alleged side deals that would have given COT an illegitimate and discriminatory advantage over other customers. That is not "misconduct" at all, for AT&T is forbidden by the tariff-filing and nondiscrimination requirements of the Communications Act from implementing such side deals. That was the holding of *Maislin*, which set aside the Interstate Commerce Commission's attempt to define carriers' re-

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[3] *See, e.g., AT&T Corp.* v. *Cheek America Corporation*, 1997 U.S. Dist. LEXIS 7429, *7-8 (N.D. Ill. May 22, 1997) ("Customer may only recover consequential damages in cases where a common carrier's violation of the tariff is found to be willful").

[4] COT cites (Opp. 9) *Primrose* v. *Western Union Tel. Co.*, 154 U.S. 1 (1894), for the proposition that willful misconduct claims are not limited by tariffs or the filed tariff doctrine, but provides no specific citation. There is none.

fusal to implement untariffed side deals as "unreasonable practices" and thus unlawful. *See Maislin*, 497 U.S. at 131-32 n.12 ("this risk of intentional misconduct on the part of a carrier has always existed and has never been considered sufficient to justify a less stringent interpretation of [the statutory filed tariff doctrine]"). As the dissent below explained, such purported "willful misconduct" claims are foreclosed by this Court's precedents and would render the filed tariff doctrine "a nullity." Pet. 29a-30a (citing *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U.S. 94 (1915) and *Kirby*, 225 U.S. 155).[5]

3. Similarly, COT tries (Opp. 10, 13) to reformulate its state law claims as discrimination claims, contending that it received poor treatment in comparison to AT&T's "favored corporate customers." Such discrimination is actionable under Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), but COT did not raise any claim under Section 202(a) in its complaint below and no such claim was litigated. Also, there was no validity to, or proof of, any such charge—or of the related allegation (Opp. 5-8) that AT&T had a scheme to disadvantage all resellers. Indeed, every jury and other tribunal to consider whether AT&T's conduct in providing SDN to resellers during this period was discriminatory has rejected this claim. *See* Pet. 4 n.1 (citing cases). In all events, because COT raised no such federal claim below, it obviously has nothing to do with the Ninth Circuit's decision on the state-law claims that COT did raise.

4. COT also seeks to rely on *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), and its holding that the

[5] COT cites (Opp. 9) *MCI Telecommunications Corp.* v. *TCI Mail, Inc.*, 772 F. Supp. 64 (D.R.I. 1991), which held that willful misconduct claims could be made for violations of extra-tariff side deals. That case, however, expressly declined to follow the leading precedent on the point (*id.* at 66-68) and has been properly discredited: the case is "[t]he exception to the case law," and "[t]he analysis in *TCI Mail* . . . is precisely the type of analysis that was rejected by the Supreme Court in *Maislin*." *Fax Telecomunicaciones* v. *AT&T*, 952 F. Supp. 946, 955 n.6 (E.D.N.Y. 1996).

Federal Aviation Act did not preclude state law fraud claims against an airline for failing to disclose its practice of overbooking flights. Opp. 10-12. COT tries to bring this case within *Nader* by claiming that AT&T engaged in "willful misconduct" or "discrimination" that was "without disclosure." Opp. 11. But this, too, was manifestly not the basis for the Ninth Circuit's holding, and *Nader* was not cited below.

COT also claims that Nader establishes that "not everything" that a carrier does is "sufficiently related to rates to bar common law remedies," that the only relationship between its claims and AT&T's rates is that a damages award in COT's favor might cause AT&T to increase its rates, and that *Nader* holds this possibility to be insufficient to preclude a state law claim. Opp. 10, 11, 13.

This is simply wrong. While "not everything" a common carrier does must be tariffed, the Communications Act requires that its tariffs contain all "charges" and all "classifications, practices, and regulations affecting such charges." 47 U.S.C. § 203(a). As Judge Brunetti noted in dissent, "[t]o avoid being an empty letter, the filed rate doctrine must encompass both rates and the services corresponding to those rates," because "rates have no meaning unless tied to corresponding services." Pet. 20a, 21a.

Thus, the reason the common law claim was not barred in *Nader* is that it would have had no "impact" on rates if the airline had "adopted" the "practice" necessary to "avoid such liability" by *disclosing* the overbookings (as all airlines now do). 426 U.S. at 299-300.

By contrast, liability was imposed here because AT&T had not provisioned orders for service faster than its tariff required. Pet. 5a. The speed with which a carrier commits to installing a service affects the rate it will charge, and AT&T would have charged higher rates if it had committed to provision SDN service orders within a 45-90 day period. For this reason—and *not* because damage claims may be passed through to customers in higher rates—the Court held in *Kirby* and *Davis* that the filed tariff doctrine pre-

cludes damage claims for a carrier's alleged failure to implement side deals concerning the pace at which service would be provided. That is the same reason AT&T's responsibilities for provisioning and billing service were set forth in FCC tariff (*see* Pet. 54a-56a),[6] and that is the same reason *Davis* holds that the alleged untariffed side agreements would be nullities even if AT&T's tariff had not expressly addressed these subjects. 264 U.S. at 561-62; Pet. 14-15.

COT correctly describes *Kirby*, *Davis*, and *Atchison, T. & S.F. Ry. Co.* v. *Robinson*, 233 U.S. 173 (1914), as cases barring claims by customers "who paid one tariff rate while claiming services that were not required by that tariff" and thus, "[i]n effect, . . . sought to pay a lower rate." Opp. 13. But that is the precise claim the Ninth Circuit improperly upheld here. COT is therefore reduced to implying that those decisions are obsolete because they were decided "more than 50 years ago" and pre-date *Nader*. This is nonsense. *Nader* did not even address the filed tariff doctrine—the issue there was whether a case should be stayed pending a primary jurisdiction referral to the Civil Aeronautics Board—and certainly did not overrule that venerable doctrine. *See, e.g., Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990) (post-*Nader* case applying filed tariff doctrine).

5. In a related vein, COT also seeks to rely on the savings clause of Section 414 of the Communications Act, 47 U.S.C. § 414, which provides:

[6] COT misrepresents the facts when it contends (Opp. 6 n.1) that AT&T stated that billing services to its long distance customers are not covered by its tariff in *International Audiotext Network* v. *American Tel. & Tel. Co.*, 62 F.3d 69 (2d Cir. 1995). Tariffs always define the terms and conditions under which a carrier bills its own telephone customers. The "billing services" referred to in *International Audiotext* have nothing to do with the services at issue here. Those were commissions AT&T paid out of long distance revenues it collected from its customers to a firm that provided an information service to long distance customers. Unlike COT, that firm was not receiving any communications services from AT&T, and was not being billed by AT&T.

> Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Once again, the Ninth Circuit did not rely on this theory, and with good reason.

Like much of the Act, Section 414 was copied from, and designed to have the same meaning as, the parallel provision of the Interstate Commerce Act which governed telecommunications before the Communications Act was passed.[7] Consistent with the usage under the Interstate Commerce Act and the demands of the filed tariff doctrine, this Court has long held that the savings clause preserves only those rights and claims that are "not inconsistent with" the statutory filed tariff requirements. *See Adams Express Co.* v. *Croninger*, 226 U.S. 491, 507 (1913).

The Act thus does not save, but preempts, state law claims of any variety that purport to require a carrier to provide service other than as described in the tariff. The Court made this undeniably clear in *Texas & Pacific Ry.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907), and has consistently maintained that rule in *Kirby*, *Davis*, and a multitude of other decisions rejecting state law contract and tort claims like COT's as preempted, not saved.[8] COT can provide no authority from this Court to the contrary, and the cases on which it relies (Opp. 14-15) are readily distinguished. None presented a state law claim that a carrier should do what the filed tariff doctrine forbids, namely to provide service on more favorable terms than the tariff described.

[7] *See MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229-30 (1994).

[8] *See, e.g., Southern Pac. Transp. Co.* v. *Commercial Metal Co.*, 456 U.S. 336 (1982); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981); *Western Union* v. *Nester*, 309 U.S. 582 (1940); *Davis* v. *Henderson*, 266 U.S. 92 (1924); *Western Union Tel. Co.* v. *Speight*, 254 U.S. 17 (1920); *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94 (1915); *Primrose* v. *Western Union Tel. Co.*, 154 U.S. 1 (1894).

6. Finally, COT again claims, as it did below, that the filed tariff decisions of this Court—including some very recent decisions [9]—are "ancient history" because, COT claims, the FCC has eliminated the filed tariff requirement. Opp. 16-18. This claim is egregiously false. The FCC Order on which COT relies was stayed by the D.C. Circuit. But, even if this order were subsequently upheld, it applies only to a few of the telecommunications carriers (and none of the carriers in other industries) now subject to the filed tariff doctrine. *See* Pet. 18-19. And, even with respect to the small percentage of carriers who would be affected by the FCC order if it ever took effect, the Ninth Circuit's decision could still be applied in scores of cases relating to services provided during the period prior to that time.

The Ninth Circuit decision will apply in *all* cases involving the overwhelming majority of telephone carriers and other carriers who will continue to be required to file tariffs under the terms of this FCC order. These are the reasons why the Ninth Circuit's decision has prompted such concern, for example, on the part of the more than 1000 local telephone companies represented by the United States Telephone Association in its *amicus* brief in support of summary reversal. In any event, it is not for COT or the Ninth Circuit to overrule a "century" of this Court's precedents (*Maislin*, 497 U.S. at 130) as "ancient history."

CONCLUSION

For the reasons given above and in AT&T's petition for a writ of certiorari, this Court should summarily reverse the decision of the court of appeals, or, in the alternative, should grant the petition for a writ of certiorari.

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[9] *See, e.g., MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

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